

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 04-970149
Withholding, Food and Beverage, Retail Sales Taxes
For the Year 1996

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ISSUE

I. Withholding, Retail Sales, Food and Beverage Tax Assessments Made Against Taxpayer as Responsible Officer.

Authority: IC 6-2.5-2-1(a, b); IC 6-2.5-6-1(a); IC 6-2.5-9-3; IC 6-3-4-8(g); IC 6-8.1-5-1(b); IC 6-9-12-7; Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

Taxpayer protests the assessment of retail sales, food and beverage, and withholding taxes as a responsible corporate officer.

STATEMENT OF FACTS

Taxpayer was determined to be a responsible officer for a failed restaurant and, as a result, was assessed liability for unpaid food and beverage, retail sales, and withholding taxes in 1997. Taxpayer submitted a protest letter on March 2, 1997 requesting a hearing to challenge the assessments. The Department responded on March 6 acknowledging receipt of the protest. The taxpayer was repeatedly offered the opportunity to schedule a protest hearing and invited to submit information substantiating the basis for his protest. After taxpayer failed to respond to the initial correspondence, a hearing was scheduled for October 9, 2001 at 10:00 AM. The taxpayer was notified of that hearing by certified mail on September 7, 2001. The taxpayer declined the opportunity to attend but submitted a facsimile on October 11 indicating his inability to attend the hearing but his intention to submit information regarding his "position" by October 12. The Department responded indicating an intention to prepare a Letter of Findings determinative of the protested issues if no further information was submitted. The taxpayer submitted a second facsimile on October 12 in which he disavowed ever having submitted the original March 1997 protest letter. Additionally, taxpayer disavowed any knowledge that the corporation owed unpaid taxes. Taxpayer did not request a hearing and did not offer to provide documentation substantiating his assertions. This Letter of Findings followed.

DISCUSSION

I. Withholding, Retail Sales, Food and Beverage Tax Assessments Made Against Taxpayer as Responsible Officer.

The taxes at issue include food and beverage, retail sales, and withholding taxes as against the taxpayer individually.

Withholding taxes may be assessed against a responsible officer under the provisions of IC 6-3-4-8(g) which states that “[I]n the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

Similarly, an individual may be held personally liable for unpaid sales taxes. IC 6-2.5 et seq. describes the manner in which the retail sales tax is assessed, imposed, and collected.

An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana. The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. *The retail merchant shall collect the tax as agent for the state.* IC 6-2.5-2-1(a, b) (Emphasis added).

Each person liable for collecting the state gross retail or use tax shall file a return for each calendar month and pay the state gross retail and use taxes that the person collects during that month . . . IC 6-2.5-6-1(a).

An individual who: (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and (2) has a duty to remit state gross retail or use taxes to the department; holds those taxes in trust for the state and *is personally liable for the payment of those taxes*, plus any penalties and interest attributable to those taxes, to the state. IC 6-2.5-9-3 (Emphasis added).

A responsible officer may also be assessed for the payment of unremitted food and beverage taxes. Under IC 6-9-12-7, “The county food and beverage tax shall be imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under IC 6-2.5.” Accordingly, assessing “responsible officers” for the payment of county food and beverage taxes is authorized under IC 6-2.5-6-1(a) by means of the mandate provided in IC 6-9-12-7.

Pursuant to Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995), three factors are relevant in determining if taxpayer is a corporate officer who had the authority and responsibility for the payment of taxes held in trust for the state. The court will look to the person’s authority within the power structure of the corporation. Where that person is a high-ranking corporate officer within the corporate power structure, that officer is presumed to have had sufficient control over the company’s finances to give rise to a duty to remit trust taxes. The presumption may be rebutted by a showing the officer did not in fact have that authority.

Second, the court will look to the authority of the officer as established by the articles of incorporation, bylaws, or employment contract.

Third, the court will consider whether the person actually exercised control over the finances of the business including whether the person controlled the corporate bank account, signed corporate check and tax returns, or determined when and in what order to pay creditors.

In the restaurant's business tax application dated October 28, 1990, taxpayer is listed as the corporation's president. In his position as corporate officer, taxpayer signed Indiana corporate tax returns. On those returns, taxpayer is listed as owning 50 percent of the corporation's shares. In documents filed with the bankruptcy court on February 14, 1997, the minority shareholders indicate that taxpayer was relieved of his responsibility as president on January 6, 1997 but that taxpayer thereafter retained the ability to write checks on corporate funds and to make use of corporate credit cards.

Under IC 6-8.1-5-1(b), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Other than making a bare averment of the assessment in the March 1997 protest letter and in the October 2001 facsimile, taxpayer has provided no substantive information to refute the propriety of the assessments. Other than making an assertion that persons other than himself were in control of the corporation during that latter half of 1996, taxpayer has provided nothing to justify a determination that taxpayer was not a "responsible officer" of that corporation. Under the standards for determining responsible officer status as set forth in Safayan, taxpayer occupied the position of corporate president and as such was presumed to have had control over the company's finances which gave rise to a duty to remit the trust taxes. In addition, unrefuted evidence demonstrates that taxpayer had absolute discretionary control over payments from corporate funds and that taxpayer exercised that control. Taxpayer has failed to meet his burden of demonstrating that the assessments against him for unpaid food and beverage, retail sales, and withholding taxes were incorrect.

FINDING

Taxpayer's protest is denied.